A

DATO' ABD RAHIM MOHAMAD

v.

ABDUL FARISH RASHID

B

COURT OF APPEAL, PUTRAJAYA
GOPAL SRI RAM JCA
RAUS SHARIF JCA
SULONG MATJERAIE JCA
[CIVIL APPEAL NO: W-02-1130-07]

C

22 SEPTEMBER 2008

CONTRACT: *Construction - Presumptive rule of construction - Sale and purchase of shares - Contract void on happening of an event - Whether purchaser could render contract void by refusing to pay balance*

D *of purchase price - Whether no party permitted to take advantage of own wrong*

By an agreement dated 16 January 2001, the defendant agreed to purchase a certain amount of shares in a company from the

E plaintiff. The defendant made part payment thereof but failed to pay the balance sum whereupon a suit was filed by the plaintiff claiming RM11,896,000 from the defendant. The defendant filed his defence. Both then applied to strike out the statement of claim and the defence respectively, but the applications were dismissed

F by the learned judge. However, when dismissing the plaintiff's application on 18 April 2007, the learned judge made an order that the dispute be tried on a summons to be taken out by the plaintiff under O. 14A Rules of the High Court 1980. The plaintiff complied and the summons was heard and judgment was entered

G for the plaintiff for the sum claimed. Being dissatisfied, the defendant has since appealed and argued that O. 14A procedure as ordered by the learned judge is wholly inappropriate to the circumstances of this case, that cls. 3.2.10 and 8.3 of the agreement had conferred an unqualified right to him to render the

H contract void by refusing to pay the balance of the purchase price and that some of the payments were made under a mistake and so should be recoverable by him.

I

Held (dismissing appeal)
Per Gopal Sri Ram JCA delivering the judgment of the court:

(1) It is not open to the defendant to raise the argument of the inappropriateness of the O. 14A procedure at this stage. The order of 18 April 2007 which directed the taking out of O. 14A summons was clearly to the prejudice of the defendant. It was also clearly an appelable order because it finally determined the rights of the defendant to have his case tried as a witness action. No appeal was however lodged and the appellant must be taken to have accepted the correctness of the learned judge's decision to have his right tried in a summary fashion. (para 3)

(2) There is a presumptive rule of construction that a party is not to be permitted to take advantage of his own wrong. The terms of the two clauses herein do not take the defendant's case outside this presumptive rule. Clearly, to allow the defendant to assert that the contract is now void in reliance on the two clauses would indeed entitle him to take advantage of his own wrong to put an end to the contract and to avoid liability. (paras 6 & 8)

(3) There was no counterclaim raised in the court below to recover the sums in question as having been paid under a mistake. It is quite plain that this argument is pure afterthought and a product of appellate ingenuity. It is completely devoid of merit. (para 9)

Bahasa Malaysia *Translation Of Headnotes*

Melalui perjanjian bertarikh 16 Januari 2001, defendan bersetuju untuk membeli sejumlah saham dalam sebuah syarikat dari plaintif. Defendan membayar sebahagian harga belian namun gagal membayar bakinya dan berikutnya plaintif memfail guaman untuk menuntut sejumlah RM11,896,000. Defendan memfail pembelaannya. Masing-masing kemudian membuat permohonan untuk membatalkan penyata tuntutan dan penyata pembelaan tetapi kedua-dua permohonan tersebut ditolak oleh yang arif hakim. Walaupun begitu, semasa menolak permohonan plaintif pada 18 April 2007, yang arif hakim telah membuat perintah bahawa pertikaian harus diselesaikan melalui satu saman yang diambil oleh plaintif di bawah prosedur A.14A Kaedah-kaedah Mahkamah Tinggi 1980. Plaintif mematuhi perintah dan ekoran itu saman telah didengar dan

penghakiman diberi kepada plaintif bagi jumlah yang dituntut oleh beliau. Tidak berpuashati, defendan merayu dan berhujah bahawa prosedur A. 14A tidak wajar digunapakai kepada halkeadaan kes di sini, bahawa fasal 3.2.10 dan 8.3 perjanjian memberikan hak tak berbelah bagi kepadanya untuk menjadikan kontrak batal dengan cara enggan membayar harga belian, dan bahawa sebahagian dari bayaran yang dibuat atas kesilapan dan kerana itu harus dikembalikan kepada beliau.

Diputuskan (menolak rayuan)

Oleh Gopal Sri Ram HMR menyampaikan penghakiman mahkamah:

(1) Adalah tidak terbuka bagi defendan membangkitkan kewajaran penggunaan prosedur A. 14A pada peringkat ini. Perintah 18 April 2007 yang mengarahkan saman A. 14A jelas telah memprejudis defendan. Ia juga jelas adalah satu perkara boleh dirayui disebabkan ia memutuskan dengan muktamadnya hak-hak defendan untuk membicarakan kes dalam satu perbicaraan bersaksi. Rayuan bagaimanapun tidak dibuat dan defendan dengan itu dianggap telah menerima bahawa yang arif hakim betul dalam keputusannya untuk mengadakan satu perbicaraan ringkas.

(2) Terdapat satu kaedah presumptive bahawa suatu pihak tidak boleh dibenarkan untuk mengambil manfaat atas kesalahannya sendiri. Terma kedua-dua fasal perjanjian di sini tidak mengeluarkan defendan dari lengkongan kaedah ini. Adalah jelas bahawa menyokong pendirian defendan bahawa kontrak kini sudah batal berdasarkan kedua-dua fasal berkenaan bererti membiarkan beliau mengambil peluang atas kesalahannya sendiri dan mengelak liabiliti.

(3) Tidak ada tuntutan balas dikemukakan di mahkamah di bawah bagi menuntut jumlah yang dikatakan dibayar atas kesilapan. Adalah agak nyata bahawa hujah ini hanyalah satu afterthought semata-mata dan terbit dari kebijaksanaan peringkat rayuan. Namun ia langsung tidak bermerit.

Case(s) referred to:

Alghussein Establishment v. Eton College [1991] 1 All ER 267 ***(refd)***

Cheall v. Association of Professional, Executive, Clerical and Computer Staff [1983] 1 All ER 1130 ***(refd)***

Gimstern Corp (M) Sdn Bhd v. Global Insurance Co Sdn Bhd [1987] 1 CLJ 123; [1987] CLJ (Rep) 102 SC ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 14A

For the appellant - Mubashir Mansor (Trevor JM Padasian with him); M/s Ghazali Arif & Partners
For the respondent - PS Gill; M/s Gill & Tang

[Appeal from High Court, Kuala Lumpur; Civil Trial No: D6-22-589-2004]

Reported by Wan Sharif Wan Ahmad

JUDGMENT

Gopal Sri Ram JCA:

[1] This is the judgment of the court.

[2] On 16 January 2001, the parties before us entered into an agreement for the sale and purchase of certain shares in a company known as Serve Vest (M) Sdn. Bhd. It is common ground that several payments were made under the agreement but outside the time limited by it. At all times material to the appeal, the appellant had paid the respondent RM5,400,000. The plaintiff, after demanding for the balance, then commenced an action to recover the sum of RM11,896,000. The defendant (the appellant before us) filed his defence and then took out an application to strike out the plaintiff's statement of claim as disclosing no reasonable cause of action. The plaintiff also filed a similar application to have the defence struck out. The learned judge before whom these applications came dismissed them both. However, when dismissing the plaintiff's application, she made a further order that the dispute between the parties be tried on a summons to be taken out by the plaintiff under O. 14A Rules of the High Court 1980. The plaintiff complied with that direction. The summons was heard and the learned judge entered judgment for the plaintiff in the sum claimed. The defendant has now appealed to us and advanced a number of grounds which he says constitute good reason warranting a trial of the action by *viva voce* evidence.

[3] One of the grounds relied upon by the defendant is that the O. 14A procedure is wholly inappropriate to the circumstances of this case. This, he says, is because there are several issues calling for the full trial of the action. With respect, we are of the view that it is not open to the defendant to raise that argument at this stage. The order of 18 April 2007 which directed the taking out of O. 14A summons was clearly to the prejudice of the defendant. Because it was an order that was meant to summarily determine the issues which the defendant wanted to have tried through *viva voce* evidence. It was therefore an appealable order because it finally determined the rights of the defendant to have his case tried as a witness action instead of it being summarily tried. No appeal was however lodged. The defendant must therefore be taken to have accepted the correctness of the learned judge's decision to have his right to be tried in a summary fashion.

[4] That brings us to the issue of construction which has been advanced before us this morning as constituting a complete answer to the plaintiff's claim. It has to do with the interpretation of two clauses in the agreement in question. The clauses are 3.2.10 and 8.3. They read as follows:

Clause 3.2.10

In the event that the FIC Approval has not been obtained for any reason whatsoever by the Cut-off Date and has not been mutually waived by the Parties in writing this Agreement shall be deemed to be terminated and rendered null and void and of no effect, and the Vendor shall refund to the Purchaser the Initial Payment without interest and the Purchaser shall release all documents provided by the Vendor prior to the termination pursuant to this Article 3.2.10 within three (3) months from the Cut-off Date or the Extended Cut-off Date, as the case maybe, failing which the Vendor shall be liable to pay interest at the Default Rate as at the date of expiry of three (3) months from the Cut-Off Date or the Extended Cut-off Date, as the case maybe, as applicable, calculated from the date of the expiry of the three (3) months to the date of actual payment including actual and full refund and neither Party shall have any claim against the other, save in respect of any antecedent breach.

Clause 8.3

> In the event that the Purchaser fails to make payment of the balance of the Purchase Price by the Expiry Date, this Agreement shall terminate, be rendered null and void and of no effect and the Vendor shall refund to the Purchaser Initial and Second payment or such part thereof that shall have been paid by the Purchaser in accordance with Article 6.11, 6.12 and 6.13 without interest within three (3) months from the date of termination of this Agreement, failing which the Vendor shall be liable to pay interest at the Default Rate as at the date of expiry of three (3) months from the date of termination of this Agreement, calculated from the date of the expiry of the three (3) months to the date of actual payment including actual and full refund.

[5] It is the submission of the learned counsel for the defendant before us that on proper construction of these clauses, his client was conferred an unqualified right by the agreement of the parties to render void the contract they had entered into by refusing to pay the balance of purchase price. It was submitted that this does not amount to the defendant taking advantage of his own wrong because there is no rule of law that a contracting party cannot rely on his own act or omission to bring the contract to an end and then rely on that act or omission to justify his refusal to comply with its terms. We were then regaled with authorities on the point to demonstrate that this is a case in which the defendant was entitled to do as he did without having to face the consequence of paying the balance of RM11,000,000.

[6] We find it unnecessary to quote at length from the several authorities cited to us. Suffice to say that there is a presumptive rule of construction that a party is not to be permitted to take advantage of his own wrong. See *Cheall v. Association of Professional, Executive, Clerical and Computer Staff* [1983] 1 All ER 1130; *Alghussein Establishment v. Eton College* [1991] 1 All ER 267. And we consider the head note of the latter authority to represent the law as it now stands on the point.

> The principle that in the absence of clear express provisions in a contract to the contrary it was not to be presumed that the parties intended that a party should be entitled to take advantage of his own breach as against the other party was not limited to cases where a party was relying on his own wrong to avoid his obligations under the contract but applied also where a party sought to obtain a benefit under a continuing contract on account of his breach.

[7] In *Gimstern Corp (M) Sdn Bhd v. Global Insurance Co. Sdn Bhd* [1987] 1 CLJ 123; [1987] CLJ (Rep) 102, Wan Hamzah SCJ summarised the proposition in the following terms:

> The rule is that if a stipulation in a contract be that the contract shall be void on the happening of an event which one or either of the parties can by his own act or omission bring about, then the party who by his own act or omission brings that event about, cannot be permitted either to insist upon the stipulation himself or to compel the other party who is blameless, to insist upon it, because to permit the blameable party to do either would be to permit him to take advantage of his own wrong to put an end to the contract, *vide* the judgment of Lord Atkinson in *New Zealand Shipping Company Ltd. v. S.D.A.E.C.D. France* [1919] AC 1.

[8] In our considered judgment, the terms of the two clauses reproduced earlier in this judgment do not take the appellant's case outside the presumptive rule of construction. It is therefore clear that to permit the defendant to assert that the contract is now void in reliance to the two clauses aforesaid would indeed entitle him to take advantage of his own wrong to put an end to the contract and to avoid liability.

[9] The other point which requires to be addressed in the submission of learned counsel for the defendant is in respect of the payment made by his client after the events set out in both the aforesaid clauses had occurred. The argument here is that the payment was made under a mistake. The defendant thought that the contract was still valid and hence made the payment. In truth the contract had already become void. A payment made under mistake in those circumstances is recoverable. The short answer to this argument is that there was no counterclaim raised in the court below to recover the sums in question as having been paid under a mistake. It is quite plain that this argument is pure afterthought and being the product of appellate ingenuity. It is completely devoid of any merit.

[10] The final point which we find it necessary to address has to do with the argument that the learned judge's orders now under appeal are bad by reason of *res judicata*. The submission here is that the learned judge when dismissing the respective applications to strike had concluded that there were issues to be tried. Having so held it was not then open to her to proceed summarily. The

short answer to this is that this is a point that ought to have been taken on the appeal directed at the order dated 18 April 2007. Having accepted the correctness of that order, the argument now raised is no longer open to the defendant.

[11] For the reasons already given, we are satisfied that this appeal is without merit. It is dismissed. The defendant must pay the plaintiff the costs of this appeal. The orders of the High Court are affirmed. The deposit in this court shall be paid out to the plaintiff to account of his taxed costs.